~~NO. 17662~~

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 17662

Vol. 3185

JOSEPH SICA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING BY JOSEPH SICA

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

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- - -

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TO THE HONORABLE JUDGES OF THE ABOVE ENTITLED COURT:

COMES NOW the Appellant, JOSEPH SICA, and respectfully petitions the above entitled Court for a rehearing as to him and urges:

THE CIRCUIT COURT HAS ERRED IN AFFIRMING THE CONVICTION AS TO SICA IN PART AND IN PARTICULAR IN OVERRULING OUR CONTENTION THAT SICA WAS PREJUDICED IN THE TRIAL COURT BY PERMITTING TESTIMONY AS TO THE REPUTATION OF SICA AS AN UNDERWORLD FIGURE AND AS A STRONG-ARM MAN.

With all due deference to this Court, the prejudice caused by this evidence far outweighed its probative value and the damage done was beyond any cure by way of instruction or explanation.

We cannot better state our position than as we urged

record (RT 707, 708):

"MR. PARSONS: To which the defendant Sica objects as incompetent, irrelevant and immaterial, and in effect this is an effort to introduce -- pardon me for not approaching the lectern sooner -- in effect this is an effort to bring before the court and jury evidence almost of other offenses or a propensity upon the part of Mr. Sica and the other defendants named, to resort to violence.

"We think it would be highly prejudicial and in the event any such testimony were offered or rather deduced here, we would have no alternative but to move this court for a mistrial. We do not believe it is material nor proper, and it is certainly highly prejudicial.

"I think we explored this on the motion to dismiss and on the indictment and that was gone into pretty fully.

"And the danger of such testimony, as was said in Benton v. United States, 233 Fed.(2), is that it creates an impression in the mind of the jury that is almost impossible to remove. I think your Honor once said, 'Once you press a button, the bell rings, that's it, you can't unring it,' or words to that effect, if I recall, if my memory serves me properly.

"We strenuously object to such testimony.

"MR. BRADLEY: If the court please, on behalf of the defendant Dragna we object to the Government introducing any evidence in regard to the reactions of the witness or the reasons why he had any such reactions, and previously cited to your Honor were the two latest Supreme Court cases in connection with this, the Michelson case in 1948 and Marshall v. United States in June of 1959 in which this very problem was discussed at length by the court. . . ."

This Court itself expressed a doubt concerning this evidence (Court's Opinion, p. 32).

Every time a motion to suppress is granted, the Government is deprived of some substantial evidence because justice requires it. Why make an exception in this situation?

There still remains to be answered the question of whether or not the other defendants knew of the alleged

reputation of underworld character of Dragna and Sica. If Sica stood in the position of a "dangerous weapon," was not Dragna then in the same position? We would not willingly harm Dragna - but where is the difference?

As counsel for Dragna so ably argued (Dragna's Opening Brief, p. 32):

> "We might add, however, an additional observation on this subject. The confusion and prejudice which resulted from the interjection by the Government of the reputation issue in the case is manifested by the instruction given by the court following objection by appellant to the fact that the court had not instructed the jury as to the limited purpose for which the reputation evidence had been admitted (RT 7705). Whereupon the court instructed (RT 7706):
>
> " 'THE COURT: The evidence of Leonard regarding the reputation of certain defendants was admitted into evidence and shall be considered by you only as showing or as evidence upon the subject of what Leonard's state of mind was concerning those defendants.
> " 'There has been no independent testimony regarding the reputations of those defendants. Reputation, as you know, is what the community thinks a person is. What the character of those defendants might be you may assess from all of the evidence in the case which might bear upon that subject. (Emphasis added.)'
>
> "Not even the prosecution, and certainly not the defendants, had put the character of the defendants in issue. But the court, by its instruction, turned the jury loose on this irrelevant and, what could only be, prejudicial tangent. (See Bloch v. United States, 221 F.2d 786, 790 (CA 9, 1955) and United States v. Tomaiolo, 249 F.2d 683, 689 (CA 2, 1957).)"

We again respectfully urge the Court has misconstrued the meaning of Michelson v. United States, 335 U. S. 469, 475, 69 S.Ct. 213, 218, and Benton v. United States, 233 Fed. 2d 491. The cases cited by the learned Court were dediced before Michelson and thus, by implication, were overruled.

In assessing this testimony, this Court has apparently given no consideration to the fact Leonard testified

before the California Athletic Commission as follows:

"Joe Sica and the other fellow, Mr. Dragna, as far as threatening, they weren't threatening." (RT 1232). On the morning of the 4th of May (Legion Meeting) "Sica never threatened" (RT 1233). "Joe didn't have too much to say" (RT 1235). That he asked Joe Sica in getting his help to arrange a fight for Leonard; that he went to see Sica and Sica went East and met him in New York; that they often met (RT 1239, 1240). Nesseth stated he had never had a misunderstanding with Sica; Sica never threatened him or frightened him (RT 1921).

THE ANONYMOUS PHONE CALL TO CHARGIN.

Nowhere in the record is there testimony which justifies the inference that Sica or anyone in his behalf phoned Chargin. Almost a month intervened between Sica inquiring of Dros when Chargin was coming to town. Sica never once attempted to influence Chargin. Remember, Chargin and Livingston were trying to get Sica to arrange a championship fight for their fighter.

Livingston, manager of Gonsalves, in the presence of Chargin, said they met Sica at Chargin's office; they asked Sica to help get their fighter Gonsalves a chance at the championship; it was friendly; Sica was doing them a favor (RT 2329-1231). Even Chargin said this in effect (RT 2245-2247); Sica never threatened him (RT 2253, 2256, 2257).

CONCLUSION

We respectfully ask the Court that this case of first impression in some respects and the importance of the rulings calls for a rehearing.

We further urge that the rehearing should be granted and the matter heard by the Court En Banc.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Defendant-Appellant, Joseph Sica

EDWARD I. GRITZ,

IENER W. NIELSEN,

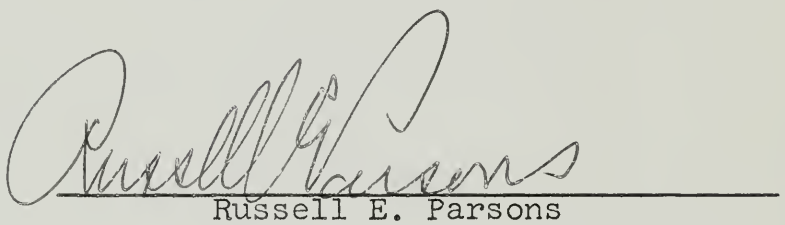
Of Counsel.

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

I, RUSSELL E. PARSONS, attorney for the Appellant JOSEPH SICA, do hereby certify that in my opinion the Petition for Rehearing is well founded and that it is not interposed for delay.

DATED at Los Angeles, California, this 6th day of March, 1963.



Russell E. Parsons